PREME COURT, U. S.

FEB 27 1969

JOHN F. DAVIS, CLERK

IN THE 1090

SUPREME COURT OF THE UNITED STATES

October Term, 1968

PAUL JOSEPH McMENAMA - - - Petitioner

Versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM H. BECK
Citizens Union Bldg.
Lexington, Kentucky
Counsel for Petitioner

This is to certify that two (2) copies of this Brief have been served, by depositing the same in a United States Post Office, prepaid Air Mail, on the Solicitor General, Department of Justice, Washington 25, D. C., and Ernest W. Rivers, United States Attorney (E. D. Ky.), Federal Bldg., Louisville, Ky.

William H. Beck

ROBERTS PRINTING CO., FRANKFORT, KY.

INDEX TO CITATIONS

Pages

Commonwealth v. Hopkins, 32 Ky. 418 11-12

Commonwealth v. Jones, 10 Ky. Opin. 320 12

People v. Owens, 23 Cal. Rptr. 449, 452, 205 C.A. 2d 775 13

U. S. v. Hawthorne, C.A. W. Va. 1956, 356 F. 2d 740 14

Inter. Harvester Co. v. Com., 137 Ky. 668, 126 S.W. 352 14

People v. Klukofsky, 114 NYS 2d 679, 202 Misc. 457 15

INDEX

Pages

OPINIONS BELOW 1-2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED 3-5

STATEMENT OF THE CASE 5-10

REASONS FOR GRANTING THE WRIT 10-15

CONCLUSIONS 16-17

APPENDIX 19-27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

PAUL JOSEPH MCMENAMA - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Paul Joseph McMenama, defendant in a criminal action prosecuted in the United States District Court, Western District of Kentucky at Louisville, and appealed to the United States Court of Appeals for the Sixth Circuit, prays that a Writ of Certiorari issue to review the judgment of the United States District Court for the Western District of Kentucky entered in this action and to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on November 27, 1969.

OPINIONS BELOW

The United States District Court for the Eastern District of Kentucky rendered no opinion. The opinion of the United States Court of Appeals for the Sixth Circuit is not reported at the time of the writing of this petition. A copy of said opinion appealed from

is appended hereto on Pages 19-23. The mandate of the United States Court of Appeals for the Sixth Circuit has not yet issued.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was rendered on the date mentioned above and the mandate has not yet issued. A petition for Rehearing was overruled on January 28, 1969.

The petitioner has been granted stay of the mandate pending this petition for Writ of Certiorari to this Court and it is expected that the mandate will issue on February 27, 1969. This petition is, therefore, filed within the thirty (30) days prescribed by Rule 22 of the Rules of the United States Supreme Court.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254 (Sub-section 1).

QUESTIONS PRESENTED

I.

WHETHER DEFENDANT, McMENAMA, SUFFERED SUBSTANTIAL PREJUDICE BY BEING CONVICTED OF A FEDERAL CRIME DEPENDENT UPON PROOF OF VIOLATION OF A STATE CRIME WHERE NO STATE CRIME WAS COMMITTED.

II.

WHETHER IT WAS PREJUDICIAL TO McMENAMA FOR THE GOVERNMENT TO HAVE USED AN ALIAS FOR HIM IN THE INDICTMENT AND CAPTION OF THIS CASE IN THE COURT BELOW.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, OR REGULATIONS INVOLVED

Title 18, Section 1952, United States Code Annotated:

"Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travel in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

K.R.S. 436.210

"COMMON GAMBLER. Any person who is without any lawful occupation but supports himself for the most part by gambling, shall be indicted as a common gambler and fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not more than six months, or both. He shall also give surety for his good behavior in the sum of five hundred dollars for one year, or be imprisoned for not more than one year or until he gives such security. If, after giving security, he bets any money or thing of value during the years at any game, he shall be deemed to have broken his recognizance."

K.R.S. 436.490

"*Betting on or transmitting bets on horse races other than authorized Kentucky races.* (1) Any person who, either for himself or as agent or employee of another, wagers money or anything of value on a horse race run or about to be run or advertised, posted or reported as being run at any race track in or out of this State, or who engages in the occupation of receiving, making, transmitting or negotiation, either in person or by messenger, telephone, or telegraph, wagers on horse races run or about to be run or advertised, posted, or reported as being run, or about to be run at any race track in or out of the State, shall, except in the case of wagers made within the enclosure of a race track licensed by the State Racing Commis-

sion during an authorized race meeting at that track, or an enclosure during regular meetings in which running, trotting or pacing racers are being conducted by associations regularly organized for that purpose, be imprisoned for not less than one nor more than twelve months.

(2) In any prosecution under subsection (1) of this section, the State need not prove that the horse race upon which the wager was placed was actually run. Proof that the wager was made upon what purported to be or what was advertised, reported or understood to be a horse race shall be sufficient to establish a prima facie case for the State."

STATEMENT OF THE CASE

The petitioner, Paul Joseph McMenama, was indicted by the October, 1966, session of the Grand Jury for the United States District Court for the Western District of Kentucky at Louisville. The indictment alleged two (2) counts.

The Grand Jury charges:

FIRST COUNT

That from on or about February 13, 1965, and continuing thereafter up to on or about February 22, 1965, in Louisville, Kentucky, Western District of Kentucky, Paul Joseph McMenama, also known as Doc Gibson, the defendant herein, did knowingly and wilfully use and cause the use of facilities in interstate commerce, that is, telephone and telegraph services between Hot Springs, Arkansas, and Louisville, Kentucky, with the intent to promote, manage, estab-

lish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, such unlawful activity being gambling in violation of the laws of the State of Kentucky, to-wit: Kentucky Revised Statutes 436.210 and 436.490; in violation of Section 1952, Title 18, United States Code.

The Grand Jury further charges:

SECOND COUNT

That from on or about February 13, 1965, and continuing thereafter up to on or about February 15, 1965, in Louisville, Kentucky, Western District of Kentucky, Paul Joseph McMenama, also known as Doc Gibson, the defendant herein, did knowingly and wilfully use and cause the use of a facility in interstate commerce, that is, the telegraph, between Louisville, Kentucky, and Hot Springs, Arkansas, with the intent to distribute the proceeds of an unlawful activity, such unlawful activity being gambling, in violation of the laws of the State of Kentucky, to-wit: Kentucky Revised Statutes 436.210 and 436.490, in violation of Title 18, United States Code, Section 1952.

A True Bill

_____

Foreman

_____

United States Attorney

Paul Joseph McMenama, the Defendant, has been found guilty by a jury of violating, on two counts, Section 1952, Title 18, of the United States Code. The verdict of guilty came on the second trial of the

case, the first having ended in a hung jury, and McMenama received a sentence of 2 years on each count, to run concurrently.

The Federal Statute is the so-called "anti-racketeering" law which basically forbids the use of interstate facilities with intent to carry on or distribute the proceeds of a business enterprise which violate the laws of the State in which it is operated. The Kentucky laws alleged to have been violated by McMenama are KRS 436.210, which punishes common gamblers, and KRS 436.490, which prohibits off track betting.

The Federal Statute specifies a five year sentence and makes a felony out of violating, in this case, misdemeanors carrying maximum penalties of only six and twelve months in the county jail.

That the purpose of this Federal Statute is solely to strike at the heart and destroy racketeers and racketeering enterprises is well settled.

The following story was presented to the jury by the United States Government:

Harold Baines is the owner and operator of Nick's Big 6 Bar in Louisville, Kentucky. He is a racing enthusiast and addicted to gambling. He often placed his bets with a Federal Stamped bookie by the name of Charles Overstreet, Jr., also of Louisville. Baines was the Government's chief witness and has never been charged by them with a crime.

During the early part of 1964, Baines received a long distance telephone call from Little Rock, Arkansas from a stranger who called himself "Doc Gibson". Mr. Baines was later able to deduce that the voices of McMenama and Doc Gibson were one and the same.

Doc Gibson allowed as how he could often assure the winners of horse races, was a track vet, and offered to furnish the names of possible winners to Baines, if Baines would split the net with him.

After Doc Gibson had given Baines, by phone, names of seven horses who won, Baines accepted Doc Gibson's proposition. So, on February 13, 1965, Baines places $200.00 with his bookie on *Larkster* running at a track in Little Rock, Arkansas. The horse paid $9.80. Shortly thereafter, at the request of Gibson, Baines sent him his share of the earnings to P. J. McMenama (in Little Rock, Arkansas), via Western Union money order. Thereafter, lady luck turned her head and upon this union, cast twenty straight losers, putting Baines in the hole for about $4,500.00.

Baines met Doc Gibson once during the latter part of 1965, at the Seelbach Hotel in Louisville, Kentucky. He identified Doc Gibson, the man he met then, as being McMenama.

The Government introduced, by the operations manager for the Western Union, receipts for the money order of $350.00, from Baines in Louisville to McMenama in Hot Springs, Arkansas. The Government also presented the jury the security manager of Southwestern Bell Telephone Company for the State of Arkansas, who related that several calls had been made from Hot Springs, Arkansas to Nick's Big 6 Bar in Louisville, Kentucky, including one on February 13, 1965.

As icing on the cake, the Government presented to the jury Edwin H. Eilers, a specal agent for the Federal Bureau of Investigation, who, after advising the jury that he was primarily concerned in his work

with organized crime in cases related to gambling, that Larkster did run at Oaklawn Park on February 13, 1965, that the horse did pay $9.80 to win; that on March 10, 1966, McMenama had voluntarily met with him at the Sherwyn Hotel in Louisville, that McMenama denied ever using the name of Doc Gibson; that McMenama, at that time, denied receiving the Western Union money order for $350.00 sent by Baines and that McMenama "*indicated*" to him that his business was gambling, horses, and politicing.

McMenama denied ever having called or met with Baines. He denied ever using the alias of "Doc Gibson".

He acknowledged receipt of the money order from Baines, but only as a favor for Doc Gibson, who he had known for about thirty years. Doc Gibson was elderly, had no driver's license for identification purposes, and therefore, could not receive in his own name Western Union money orders. McMenama testified further that Doc Gibson had since died somewhere in California.

The affidavit of John Jump, a mutual window ticket seller, who was not present to testify in person, confirmed the existence and identity of Doc Gibson.

The Government's case is as remarkable for what was omitted as for what was included.

Paul Joseph McMenama lives on a farm near Jamestown, Kentucky. He has lived there seven years, having some brood mares that he breeds; and, also, has some yearlings and weanlings. McMenama does follow the tracks, as do most all people in that business, large and small.

The Government never proved, or even indicated, that McMenama made his living from gambling, or mostly from gambling, or that he made, for that matter, any part of his living from gambling. The Government never proved or indicated that McMenama made an off track bet in Kentucky; or furnished money for an off track bet in Kentucky; or that McMenama knew Baines had made an off track bet in Kentucky; or that Baines would make an off track bet in Kentucky.

The Government doubted, but never proved that Doc Gibson was not a real, live person.

The Government never proved Baines was engaged in any form of business enterprise involving gambling, or that Baines was involved with racketeers or that Baines was or had been a racketeer.

The Federal Government failed to prove one single instance of a bet, on track or off, in or out of Kentucky, made by McMenama.

REASONS FOR GRANTING THE WRIT

(1) Petitioner suffered substantial prejudice by being convicted of a federal crime dependent upon proof of a violation of a State crime without proof the State crime was ever committed.

There can be no violation of the Federal Statute if the State Statutes have not been violated. As we pointed out, the Federal Statute forbids the use of interstate facilities to those business enterprises which violate the laws of the State in which they are committed.

K.R.S. 436.210

This ancient Statute penalized anyone who (1) is without any lawful occupation, but (2) supports himself for the most part by gambling, and declares him to be a common gambler.[1]

It is then, the character of the accused which must be proved.

The Government seemed so intent on proving the existence of a connection with an interstate facility that it blatantly overlooked the necessity of proving McMenama violated this Statute.

The Government failed to prove McMenama was without a lawful occupation, or that he supported himself, in *any* part, by gambling.

As we have pointed out, agent Eilers of the F.B.I. did testify that McMenama "indicated" that he was not employed, but "his business was gambling, horses and politicing."

You will note that the Government was careful never to be more specific, careful never to ask McMenama direct, and careful never to introduce any more proof.

All the Government offered was "indications", never anything specific.

The Government did not refute or diminish McMenama's testimony that he owned a farm, raised horses and yearlings and brood mares. Of course, he follows the tracks. Most horse people, as they are known, do.

Commonwealth v. Hopkins, 32 Ky. 418, established the requirements for proving a person a common gambler. There must be proved acts of unlawful gambling *accompanied* with evidence that the accused

pursued an unlawful calling. The Court was of the opinion that *one act* of unlawful gambling, with evidence of circumstances to justify a conviction, such as the display of all apparatus of an open undisguised gamble, might warrant a conviction, but even then, there must be evidence that the accused pursued "the business of unlawful gaming."

Clearly, the Government never had a case, but hoped to score with a punch below the belt.

K.R.S. 436.490

This Kentucky Statute prohibits (1) the off track wagering (2) on any track, in state or out, and

(1) The occupation of (2) receiving, making, transmitting or negotiation (3) off track wagers (4) on any track in state or out.[1]

There are two separate ways to violate this Statute. One is simply to make an off track bet. The other is to be in the business, i.e., be a bookie.

The Government failed to prove McMenama ever made a bet. Their chief witness admitted that he made a bet on a horse named "Larkster" with a bookie in Louisville (TR 45, 46), and there is no such thing as an accessory or an accomplice in the offense of gambling. *Commonwealth v. Jones,* 10 Ky. Opin. 320.

No money went from McMenama to Baines to be bet on "Larkster". McMenama was not even in the State of Kentucky when the bet was made.

As the Assistant U. S. Attorney told the jury in his opening statement, " . . . the defendant touted or conned a man named Harold Baines into betting, usually losing on horse races, generally in Hot Springs area, and betting taking place in Louisville."

And if all the evidence were to be believed, the worst that could be proved is that McMenama "conned" Baines into believing that he was an excellent handicapper.

Neither can McMenama be said to have engaged in the occupation denounced by that Section. For the only proof ever offered--are the "indications" to the Federal Bureau of Investigation.

These "indications" are even less applicable to this Statute than to K.R.S. 436.210.

To gamble means to bet and to win or lose. *Allen v. Com.*, 178 Ky. 250, 198 S.W. 896, 897. It means to risk money or something of value. There are three necessary elements to gambling: consideration, chance, and reward.

The furnishing of the name of a horse, vouching for its merits, with the understanding that should the horse win, the profits from a bet made by the receiver of the information should be divided with the offeror, can not be, to the offeror, a gamble. He puts up no consideration, and stands no chance of losing. He merely asks a reward for his information, should it be correct.

Baines never testified that he and McMenama would divide the losses.

The Court below took judicial notice of the meaning of the word "tout", when McMenama was apparently so described (TR 81), by agent Eilers of the Federal Bureau of Investigation.

A tout persuades a person to bet on a horse race and then asks money for information given. *People v. Owens,* 23 Cal. Rptr. 449, 452, 205 C.A. 2d 775.

And if the F.B.I., the Assistant U. S. Attorney and their unindicted chief witness are to be believed,

that is all in the world that McMenama can be said to have done.

The Government decided to prosecute his case in the United States District Court in the Western District of Kentucky.

All McMenama can be said to have done is received moneys, through the Western Union, in Little Rock, Arkansas, and advised a Kentuckian, over the telephone, of a probable winner of a horse race.

The transfer of the money, through the Western Union can only be a crime committed by Baines. *U. S. v. Hawthorne,* C.A. W. Va. 1956, 356 F2d 740.

The use of the telephone from Little Rock, Arkansas to Louisville, Kentucky by McMenama, if true, does not violate the Federal Statute, because the news transmitted was available to the general public. He only did what any handicapper for any newspaper has done.

While we do not attack the venue of the Lower Court, the Government must prove that the acts complained of violated Kentucky laws.

Acts not committed within the venue of Kentucky do not violate Kentucky laws. Venue is a jurisdictional fact of locality, charged in the indictment and put in issue by a plea of not guilty.

Any act alleged to have been done by McMenama was done outside the Commonwealth of Kentucky and venue of any of her Courts. The power of the Legislature of Kentucky to define and punish crimes ends at her borders. *Inter. Harvester Co. v. Com.,* 137 Ky. 668, 126 S.W. 352.

One cannot be a common gambler in Kentucky because of one act in Arkansas. One cannot have engaged in the business of making off track bets, or

have made an off track bet, just because of a telephone call made in Arkansas, or just because of the receipt of a Western Union Money Order.

For these reasons, the Government's case must fail.

II. IT WAS PREJUDICIAL TO McMENAMA TO HAVE USED AN ALIAS FOR HIM IN THE INDICTMENT AND CAPTION OF THIS CASE?

The indictment, which was read to the jury (TR 13), referred to "Paul Joseph McMenama also known as Doc Gibson".

We realize that no specific objection was made to strike until this case was before the Sixth Circuit Court of Appeals. Yet, we know that a trial is a game of move and counter move, check and checkmate.

There was no opportunity, until after the close of the Government's case, to realize that the Government had not proved that McMenama had been known to use this alias. The general rule requires that defendant to have moved to strike at his arraignment. The only proof offered, of course, is that Baines knew him as "Doc Gibson".

We believe that "also known as" leaves the impression that the person is known to the *public,* or at least a great number of people, or maybe even the police authorities under the name of an alias. None of these situations was proven to be true in this case.

Over a period of time, the use of an alias has come to connote in the public mind some previous criminal activity, and the use of the word, when unproven is unfavorable to the defendant. See *People v. Klukofsky,* 114 N.Y.S. 2d 679, 681, 202 Misc. 457.

CONCLUSION

We suggest that the Court read carefully the counts of the indictment.

Both counts allege the criminal act to have been committed "in Louisville, Western District of Kentucky."

His personal violation of the Kentucky Statute is alleged. Paul Joseph McMenama is the subject of those long sentences in each of the counts and each and every clause and phrase refers to him.

So the opinion of the Court below that "His personal violation of the designated Kentucky statutes is not alleged, and his presence in that state is neither alleged nor essential to the commission of the offense charged," is potently erroneous.

This statement, so important to the opinion of the Court, is supported neither by law nor fact.

The Court has also held that the only fact of which McMenama is guilty is "inducing" Baines to make a bet.

"Inducing" is not an act or a word contained in 18 U.S.C. 1952.

We suggest it to be extraordinary that anyone could induce a confirmed gambler to make a bet. Baines wanted to bet. He did bet. He had bet. And we gather from the evidence that he will bet again.

One additional point this Court can not ignore is the fact that only the Distributor is condemned by the Anti-Racketeering Law. No mention is made of the Distributee. And Baines, not McMenama, was the Distributor.

We see no difference in this case and part-post betting, which is reprehensible, but not a crime.

We reiterate again our belief that McMenama committed no crime contrary to the laws of Kentucky. He did not carry on the betting. He did not make it easier for Baines to bet. The evidence shows Baines was a regular gambler and bet steadily without any assistance.

All McMenama did was what the Track Handicapper does at any track, what the Daily Racing News does—Handicap.

Respectfully submitted,

WILLIAM H. BECK

APPENDIX A

No. 18,448

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

PAUL JOSEPH MCMENAMA, also known as DOC GIBSON - - - - *Defendant-Appellant*

ON APPEAL

from the United States District Court
for the Western District of Kentucky.

Decided November 27, 1968.

Before: O'SULLIVAN, PECK and MCCREE, Circuit Judges.

PECK, Circuit Judge. Defendant-appellant was convicted and sentenced pursuant to a jury verdict finding him guilty of both counts of a two-count indictment charging violations of 18 U.S.C. § 1952. That section is captioned "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises," and provides that one is guilty of a crime who travels or uses any facility in interstate commerce with intent

to "distribute the proceeds of any unlawful activity," to "further any unlawful activity," or to "otherwise promote, manage, establish, carry on .... any unlawful activity." Subsection 1952(b) defines "unlawful activity" for purposes of the statute as meaning (among other things) "any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed...." The indictment in the present case alleges violations of Kentucky Revised Statutes 436.210 and 436.490.

The testimony received at both trials (the first terminated in a hung jury, the second in the conviction from which the present appeal was perfected) established that chief government witness Baines, a Louisville, Kentucky, tavern owner, received a telephone call in that city from a "Doc Gibson" who was theretofore unknown to Baines; that Doc Gibson identified himself as a track veterinarian who could accurately predict racetrack winners, and who proposed to supply such winners to Baines if the latter would make bets through bookmakers and split the winnings after taking his expenses "off the top."

Baines testified that after Doc Gibson had in long-distance telephone calls supplied the names of seven straight winners he accepted the proposal and began making bets under it; that on a specified date he so placed a $200 wager on a horse named Larkster who won and paid $9.80 on a $2.00 ticket, and that he thereafter remitted $350 by Western Union telegram to "P. J. McMenama, Little Rock, Arkansas," Gibson having given instructions that remittance be made to that name and address. Details of the winning of a race by Larkster on the date named at the price stated

and of the remittance were corroborated by other witnesses. Baines further testified that after losing some $4,500 on other horses recommended by Doc Gibson by long-distance telephone he arranged to and did meet Gibson in a Louisville hotel lobby. Baines testified that all of the calls received from Doc Gibson were from the same man with a "distinctive" voice, and that the man with whom he conferred in the hotel lobby was also the same man. He identified the defendant in the courtroom as being that man.

In his testimony defendant-appellant denied that he had ever called Baines on the telephone or that he had ever met him, and denied ever having used the alias "Doc Gibson." He acknowledged receiving, endorsing and cashing the money order from Baines, contending that he did it as a favor for Doc Gibson, whom he had known for about thirty years, but who could not receive a Western Union money order in his own name because he had no driver's license for identification purposes. He further testified that Doc Gibson had subsequently died somewhere in California. While the issue is not squarely presented on this appeal,* there can be no question but that sufficient evidence existed to present to the jury the question of whether defendant-appellant had identified himself by telephone and in the hotel lobby meeting as "Doc Gibson."

Appellant in his brief states the first question on this appeal to be whether the government had proved "that McMenama had violated K.R.S. 436.210 or K.R.S. 436.490," but of course that question was not presented in the court below nor is it an issue here,

---

*Appellant made no motion at any time for a judgment of acquittal on this basis. See *United States* v. *Gosser*, 339 F.2d 102, 110 (6th Cir. 1964), *cert. denied*, 382 U.S. 819 (1965) and the cases cited therein.

and it is not responsive to any contention of the government. The first count of the indictment charges that he used "facilities in interstate commerce, that is, telephone and telegraphic services between Hot Springs, Arkansas, and Louisville, Kentucky, with the intent to promote" gambling in violation of Kentucky law; the second count of the indictment charges that he used telegraphic interstate commerce facilities between the same cities "with the intent to distribute the proceeds of gambling activities unlawful under Kentucky law." His personal violation of the designated Kentucky statutes is not alleged, and his presence in that state is neither alleged nor essential to the commission of the offense charged.

The first of the two specified Kentucky statutes (K.R.S. 436.210) is an ancient one which appears to have been construed in only one hoary case (*Commonwealth* v. *Hopkins*, 32 Ky. 418 (1834)). Appellee argues without spirit that appellant fits that statute's definition of a "common gambler," but we pass the question of its application as immaterial to the conclusion hereinafter reached. See *Myrick* v. *United States*, 332 F.2d 279, 281 (5th Cir. 1963); *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 796 (9th Cir. 1963).

K.R.S. 436.490 establishes as a crime the placing of any wager on horse races "except [those] made within the enclosure of a race track licensed by the State Racing Commission during an authorized race meeting at that track," or at other specified "enclosures." The proscribed offense is commonly conducted with a bookmaker and is referred to as "off-track" betting. There was evidence tending to show that appellant used a facility in interstate commerce, namely the telephone, to promote and carry on the unlawful

activity of off-track betting (by inducing Baines by telephone to make such bets), and that he used another facility of interstate commerce, namely, the telegraph, to distribute the proceeds of that unlawful activity (by inducing Baines to so make remittance). 18 U.S.C. §2. The evidence of the record is further sufficient to support the conclusion necessary to the jury verdict that the requisite intent was present. See *United States* v. *Miller,* 379 F.2d 483, 486 (7th Cir.), *cert. denied,* 389 U.S. 930 (1967).

Appellant contends in this court for the first time that he was prejudiced by the caption of the indictment which reads, "United States of America v. Paul Joseph McMenama, also known as Doc Gibson." As hereinabove indicated, this case was tried not once but twice in the District Court. Although what he might have anticipated the essence of the government's case to be at the first trial may be open to conjecture, clearly by the time the case was retried some four months later the appellant had intimate knowledge of the details of the government's contentions. In spite of this he at no time either prior to the first trial, subsequent to the second trial, or in the interim between them complained of prejudice on this account. In these circumstances it is held that the issue has not been preserved for appellate review. *Eisner* v. *United States,* 351 F.2d 55, 58 (6th Cir., 1965); *McDowell* v. *United States,* 336 F.2d 435, 439 (6th Cir. 1964), *cert. denied,* 379 U.S. 980 (1965).

The judgment of conviction is affirmed.

APPENDIX B

No. 18,448

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

PAUL JOSEPH MCMENAMA, also known as DOC GIBSON - - - - *Defendant-Appellant*

ORDER

Before: O'SULLIVAN, PECK and MCCREE, Circuit Judges.

Upon consideration it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT.

CARL W. REUSS
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 18,448

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

vs.

PAUL JOSEPH MCMENAMA, A/K/A
DOC GIBSON - - - - - - *Defendant-Appellant*

Before: O'SULLIVAN, PECK and MCCREE, Circuit Judges.

ORDER STAYING MANDATE

ORDERED, That Motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by order of the Court.

CARL W. REUSS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1090

PAUL JOSEPH McMENAMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 403 F. 2d 969.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1968. A petition for rehearing was denied on January 28, 1969. The petition for a writ of certiorari was filed on February 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence sustained petitioner's conviction of using interstate telephone and telegraph

337-921—69

services to facilitate an unlawful gambling activity.

2. Whether it was proper to include petitioner's alias in the indictment.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Kentucky of using telephone service between Hot Springs, Arkansas, and Louisville, Kentucky, with intent to facilitate the carrying on of an unlawful activity, *viz.*, a gambling enterprise in violation of the laws of Kentucky (Count 1), and of using an interstate telegraph facility with intent to distribute the proceeds of such unlawful activity (Count 2), both in violation of 18 U.S.C. 1952.[1] He was sentenced to

[1] 18 U.S.C. 1952 provides in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, * * * in violation of the laws of the State in which they are committed * * *.

* * * * *

concurrent terms of two years imprisonment (R. 1–2).[2] The court of appeals affirmed (Pet. App. A).

In early 1964, Harold Baines, a tavern owner in Louisville, Kentucky, received a telephone call from Hot Springs, Arkansas, from a person who identified himself as "Doc Gibson." Gibson stated that he was a veterinarian and claimed that he had "a way with making horses win". He offered to give tips on Arkansas races to Baines, who would then bet on the races and split his winnings with Gibson. From time to time, Baines received further calls at his tavern from Gibson in Hot Springs, in which Gibson predicted a number of winning horses (Tr. 19–22, 30).

On February 13, 1965, Baines received a telephone call from Gibson in Hot Springs advising him to bet on a particular horse.[3] Baines bet on the horse through a local bookmaker; the horse won and, pursuant to Gibson's instructions, Baines sent $350 by Western Union money order to P. J. McMenama in Little Rock, Arkansas (Tr. 22–25, 30–31, 45, 47–51, 52–54). The money order was cashed by petitioner (Tr. 89).[4]

---

[2] "R." refers to the record filed in this Court. "Tr." refers to the transcript of the trial beginning October 20, 1967, marked by petitioner as "C". The transcript marked "B" by petitioner is of an earlier trial under the same indictment, which ended in a hung jury.

[3] An official of the telephone company corroborated Baines' testimony as to this and other calls (Tr. 58–67).

[4] Petitioner admitted this at trial, explaining that he did it as a favor for Doc Gibson, an elderly friend, who had since died. He denied ever meeting Baines or talking with him on the telephone.

On subsequent bets pursuant to tips received by telephone from Gibson, Baines lost approximately $4,500 (Tr. 25). Thereafter, Baines met "Gibson" in a Louisville hotel and recognized his voice as that of the man who had proposed the betting scheme and had given betting instructions over the telephone. At trial, Baines identified petitioner as the man he had met in the hotel (Tr. 26–29).

ARGUMENT

1. Contrary to petitioner's challenge to the sufficiency of the government's proof, it is immaterial whether petitioner himself violated the Kentucky statute prohibiting off-track betting,[5] *McIntosh* v. *United States*, 385 F. 2d 274, 277 (C.A. 8), and cases there cited. The offense charged under count 1 was the use of interstate telephone services with intent to promote or facilitate an activity prohibited under State law. The jury could properly find that petitioner, using the false name of "Doc Gibson," made the interstate calls with the intent that Baines place the recommended bets with a bookmaker, as he did, in violation of Kentucky law. The evidence also

[5] Each of the two counts of the indictment charged that petitioner used the facilities of interstate commerce to promote gambling activity in violation of Kentucky law in two respects: "activity" as a "common gambler" (K.R.S. 436.210) and (2) off-track betting on race horses (K.R.S. 436.490) (see Pet. 4–6). Since the proof showed that petitioner used interstate facilities to promote the unlawful activity of off-track betting, and to distribute the proceeds of that activity, the court of appeals correctly concluded that it was unnecessary to pass upon the applicability of the "common gambler" statute to this case (Pet. App. A, 22).

justified the conclusion that petitioner instructed Baines to make his remittance by using interstate telegraph facilities, as charged in Count 2. Petitioner's conduct thus fell within the proscriptions of the Travel Act; it was not necessary for the government to establish that it was tied to an organized crime operation. See *United States* v. *Barnes,* 383 F. 2d 287, 289 n. 2 (C.A. 6), certiorari denied, 389 U.S. 1040.

2. Petitioner did not complain in the district court of his identification in the indictment as "Paul Joseph McMenama, also known as Doc Gibson." Emphasizing that petitioner had been convicted at a second trial under the same indictment, the court of appeals properly held that no issue was preserved for appellate review. In all events, since the alias was proved and was an integral part of the offense, petitioner has no basis for his contention. *United States* v. *Solowitz,* 99 F. 2d 714, 715 (C.A. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
KIRBY W. PATTERSON,
Attorneys.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969